WRP ASIA PACIFIC SDN BHD v. LEE SON HONG & ORS

HIGH COURT MALAYA, KUALA LUMPUR
LIZA CHAN SOW KENG J
[ORIGINATING SUMMONS NO: WA-22NCC-391-08-2020]
17 NOVEMBER 2023

Abstract – *A director of a company is in a fiduciary relationship with his company and as such, he is precluded from acting in a manner which would bring his personal interest into conflict with that of the company.*

COMPANY LAW: *Directors – Fiduciary duties – Breach – Directors of company ('first company') with majority of control of company – Directors caused first company to enter into transactions and/or agreements with another company ('second company') – Second company channelled monies to third company which directors had beneficial interests in – Monies siphoned – Whether there was prima facie case – Whether directors breached their duties as directors of first company – Whether first company suffered losses as result of directors' breaches – Whether directors liable to compensate first company for losses – Companies Act 2016*

EVIDENCE: *Adverse inference – Failure to testify – Directors of company ('first company') with majority of control of company – Directors caused first company to enter into transactions and/or agreements with another company ('second company') – Second company channelled monies to third company which directors had beneficial interests in – Monies siphoned – Directors claimed transactions were proper and chose not to testify – Whether directors material witnesses – Whether adverse inference ought to be drawn against directors*

The plaintiff was a company incorporated in Malaysia, carrying on the business of manufacturing and marketing disposable medical, industrial and other specialty gloves, urological catheters and other related products and services. The plaintiff initially filed this action against five defendants but later discontinued the action against the third to fifth defendants and only proceeded against the first and second defendants. The first and second defendants were husband and wife and were the directors and shareholders of the plaintiff with the majority control of the plaintiff's Board of Directors. Equatorion Sdn Bhd ('Equatorion') was a company related to the first and second defendants as it was alleged that the first and second defendants controlled Equatorion through their relatives and the plaintiff's staff. KSG Engineering Sdn Bhd ('KSG') was a company incorporated in Malaysia and involved in engineering works, producing and assembling of glove machines and supplies of glove machinery parts. The plaintiff alleged that the first and second defendants had caused the plaintiff: (i) to enter into several transactions and/or agreements with KSG to supply glove dipping lines ('factory lines') to the plaintiff's factory fraudulently priced at RM8,196,000 for each line which included the price of the auxiliary equipment of the

A factory lines without intention that the auxiliary equipment would be supplied, installed and commissioned by KSG. Each factory line was priced at RM4,000,000 extra; and (ii) along with its financiers, to pay KSG a total sum of RM32,784,000 for the factory lines. KSG then channelled a sum of RM13,100,000 to Equatorion, purportedly for Equatorion's supply of B auxiliary equipment which Equatorion did not, thus causing a loss of RM13,100,000 to the plaintiff. Hence, the present claim against the first and second defendants for breaching their fiduciary duties. The first and second defendants' defence was essentially one of denial. The issues that arose were: (i) whether the first and second defendants had breached their duties as C directors of the plaintiff in causing the payment of a sum of RM13,100,000 to Equatorion for the purported supply of auxiliary equipment; and (ii) if issue (i) was answered in the affirmative, whether the plaintiff had suffered losses as a result of the first and second defendants' breaches and if so, liable to compensate the plaintiff for such losses.

D **Held (allowing claim):**

(1) The plaintiff had proven a *prima facie* case on a balance of probabilities, that the first and second defendants had acted in breach of their duties to the plaintiff and the plaintiff had suffered losses as a consequence of their breaches of duties. The first and second defendants had a case to E answer in respect of the fictitious supply of auxiliary equipment by Equatorion through fabricated invoices and receipts; secretly profiting of the sum of RM13,100,000 and gaining a personal benefit therefrom that pointed towards their breaches of duties as directors. The fate of the claim against them for breach of duties as directors was sealed when F both the first and second defendants did not testify since they claimed in their defence that the transactions entered into with KSG was proper. The first and second defendants were clearly material witnesses due to their forming the majority of the Board of Directors of the plaintiff and their obvious control of Equatorion and beneficial interests therein. The G court was thus entitled to draw an adverse inference against the first and second defendants where, as here, both were conversant thoroughly with the material facts of the case, advanced no credible reason as to why they did not care to give evidence. Such failure to testify also entitled the court to presume to be true the evidence given by the plaintiff's witnesses. (paras 34, 36 & 38)

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(2) Inflating the cost for each of the factory line by RM4,000,000 and having the monies siphoned to Equatorion which both the first and second defendants were beneficially interested in, and at the expense of the plaintiff, was not conduct of loyalty and fidelity to the plaintiff when I both of them were placed in a position of confidence and trust. An intelligent and honest man in the positions of either the first and second defendants could not, in the whole of the existing circumstances, have reasonably believed that what they did was acting primarily in good

faith, *bona fide* and would be in the best interest of the plaintiff. As fiduciaries, the foremost consequence was that both would owe a duty of undivided loyalty to the plaintiff and must be held accountable. From the evidence adduced, they had undoubtedly personally profited from the KSG transactions when a substantial portion of the funds for the purchase of the factory lines originating from the plaintiff and their financiers ended up in the first defendant's own bank account or in companies related to them. It was a pure and simple case of the proverbial 'harap pagar, pagar makan padi'. (para 38)

(3) The first and second defendants indubitably failed to exercise their powers as directors for a proper purpose, failed to exercise reasonable care skill and diligence in the discharge of their duties; breached their duty to act in good faith and in the best interest of the plaintiff and breached their duties (i) of permitting their interest to conflict with that of the plaintiff; (ii) not to make a secret profit with impunity; and (iii) to disclose to the plaintiff's Board of Directors their personal interest in Equatorion. The plaintiff's shareholders' consent at a general meeting was not sought to allow the first and second defendants to make the profit of RM13,100,000. Even if the second defendant did not actively participate in the KSG transactions, she was not absolved. Her silence amounted to her tacit approval of all that was wreaked by the first defendant. She was thus complicit in the plunder of the plaintiff. She had allowed Equatorion to be used as a vehicle by the first defendant to loot the plaintiff, in dereliction of her duties to safeguard the interests of the plaintiff as a whole. (para 41)

(4) Issue (i) was answered in the affirmative. The plaintiff had suffered losses in respect of a sum of RM13,100,000, as well as finance charges on the said sum arising from the various hire-purchase agreements with the financiers which was calculated at RM2,532,608.04. The plaintiff's losses were causally connected directly to the first and second defendants' breaches of directors' statutory and fiduciary duties to the plaintiff. The first and second defendants were jointly and/or severally liable to pay and/or account to the plaintiff the sum of RM13,100,000. The sum of RM2,532,608.08 was the finance charges on the sum of RM13,100,000. (paras 43 & 45)

Case(s) referred to:

Avel Consultants Sdn Bhd & Anor v. Mohd Zain Yusof & Ors [1985] 2 CLJ 11; [1985] CLJ (Rep) 37 SC ***(refd)***

Bristol and West Building Society v. Mothew (t/a Stapley & Co) [1998] Ch 1 ***(refd)***

Dato' Pardip Kumar Kukreja & Anor v. Veil Paari Samy Vellu [2015] 1 LNS 1482 CA ***(refd)***

Khaw Cheng Bok & Anor v Khaw Cheng Poon & Ors [1998] 1 LNS 340 HC ***(refd)***

Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***

Lim Kim Hua v. Ho Chui Lan & Anor [1996] 2 CLJ 299 HC ***(refd)***

Loi Hieng Chiong v. Kon Tek Shin [1983] 2 CLJ 70; [1983] CLJ (Rep) 240 FC ***(refd)***
Md Hilmi Md Noor & Anor v. Azman Ahmad & Ors [2016] 7 CLJ 360 CA ***(refd)***
Newacres Sdn Bhd v. Sri Alam Sdn Bhd [2000] 2 CLJ 833 FC ***(refd)***
Petra Perdana Bhd v. Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors [2014] 1 LNS 236 HC ***(refd)***
Pioneer Haven Sdn Bhd v. Ho Hup Construction Company Bhd & Anor And Other Appeals [2012] 5 CLJ 169 CA ***(refd)***
Siti Haida Ismail v. Siti Maznah Yahya & Ors [2018] 1 LNS 1081 CA ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***
Tan Kah Khiam v. Liew Chin Chuan & Anor [2006] 4 CLJ 715 CA ***(refd)***
TAZ Logistics Sdn Bhd v. TAZ Metals Sdn Bhd & Ors [2019] 2 CLJ 48 CA ***(refd)***
Tenaga Nasional Bhd v. Bukit Lenang Development Sdn Bhd [2017] 1 LNS 721 CA ***(refd)***
Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors. & Other Appeals [1997] 2 CLJ 607 CA ***(refd)***
Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal [2018] 2 CLJ 641 FC ***(refd)***
The Board Of Trustees Of The Sabah Foundation & Ors v. Datuk Syed Kechik Syed Mohamed & Anor [2008] 3 CLJ 221 FC ***(refd)***
U-Re Auto Sdn Bhd v. York Pacific Holdings Ltd [2004] 3 CLJ 172 CA ***(refd)***
Yeohata Machineries Sdn Bhd & Anor v. Coil Master Sdn Bhd & Ors [2016] 2 CLJ 414 CA ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 131, 132(1), (1A), (1B)
Companies Act 2016, ss. 213(1), (2), 214, 218(1), 221(1), (9)
Rules of Court 2012, O. 59 r. 16

Other source(s) referred to:
Ford, *Principles of Corporations Law*, Chapter 8, para 8.050, p 312

For the plaintiff - Nathalie Annette Kee; M/s Thomas Philip
For the 2nd defendant - Emily Wong; M/s Wong & Co

Reported by Lina E

JUDGMENT

Liza Chan Sow Keng J:

Introduction

[1] This action was filed on 19 August 2020 against the first defendant ("D1"), second defendant ("D2") and three other defendants *inter alia*, for breach of fiduciary duties, conspiracy to injure the plaintiff by unlawful means and dishonest assistance.

[2] The plaintiff has discontinued the action against KSG Engineering Sdn Bhd ("KSG") the third defendant, the fourth defendant and the fifth defendant (D5). Consequently, the statement of claim ("SOC") was amended to drop the claims of conspiracy to injure the plaintiff by unlawful means and dishonest assistance.

[3] The plaintiff seeks *inter alia*, the following relief against D1 and D2: A

(i) declaration that D1 and/or D2 breached their fiduciary duties as directors of the plaintiff;

(ii) declaration that D1 and D2 are jointly and severally liable to make payment and/or account for the sum of RM13,100,000; B

(iii) an order that D1 and/or D2 pay the sum of RM13,100,000 to the plaintiff;

(iv) damages, interest and costs.

[4] During trial lasting seven non-consecutive days, the plaintiff called ten witnesses to give evidence in support of its claim. Both D1 and D2 did not testify nor called any witness. C

Background Facts

[5] The plaintiff, is a company incorporated in Malaysia carrying on business in manufacturing and marketing of disposable medical, industrial and other specialty gloves, urological catheters and other related products and services. D

[6] D1 and D2 are husband and wife. Both D1 and D2 were at all material times directors and shareholders of the plaintiff. Together, they had majority control of the plaintiff's board of directors. D1 was the managing director ("MD") and the chief executive officer ("CEO") of the plaintiff and was responsible for the day-to-day management of the plaintiff's business operations. E

[7] Equatorion Sdn Bhd ("Equatorion") is a company related to D1 and D2. D2 is a major shareholder of Equatorion, controlling 66.7% of its shareholding. D1 and/or D2 were also former directors and/or shareholders of Advanced Healthcare Products Sdn Bhd ("AHP"), Advanced Medical Products Sdn Bhd ("AMP"), Asia Cosmopolitan Sdn Bhd ("Asia Cosmopolitan") and Grand Ten Holdings Sdn Bhd ("GTH"). F G

[8] KSG is a company incorporated in Malaysia, involved in engineering works, producing and assembling of glove machines and supplies glove machinery parts.

[9] The plaintiff alleged that: H

(i) D1 and D2 had caused the plaintiff to enter into several transactions and/or agreements with KSG to supply glove dipping lines 9, 10, 11 and 12 ("the factory lines") to the plaintiff's factory 3, fraudulently priced at RM8,196,000 for each line which included the price of the auxiliary equipment of the factory lines without intention that the auxiliary equipment will be supplied, installed and commissioned by KSG. Each factory line was priced at RM4,000,000 extra; I

(ii) D1 and D2 caused the plaintiff and its financiers Maybank Berhad, Tokyo Century Capital (Malaysia) Sdn Bhd and Pac Lease Berhad to pay KSG a total sum of RM32,784,000 for the factory lines. KSG then channelled a sum RM13,100,000 to Equatorion, purportedly for Equatorion's supply of auxiliary equipment which Equatorion did not; thus causing a loss of RM13,100,000 to the plaintiff;

(iii) D1 and D2 controlled Equatorion through relatives and staff of the plaintiff; and

(iv) D1 and D2 made a secret profit of RM13,100,000 at the plaintiff's expense;

(v) D1 and D2's actions are in breach of their duties as directors to the plaintiff; and

(vi) the plaintiff has suffered loss arising from D1 and D2's breaches of duties.

[10] D1 and D2's defence essentially is one of denial and summarised as follows:

(i) deny any fraudulent overpayment as alleged by the plaintiff as it would have been the financiers who paid for the same. The financiers would have inspected and valued the factory lines (including any auxiliary equipment) and had never raised any issue or concern on overpricing or missing equipment;

(ii) the plaintiff had approved the supply of auxiliary equipment in its ordinary course of business. At all material times, D1 as MD and CEO is empowered to commit the plaintiff into the said transactions;

(iii) the plaintiff's action based on transactions in 2013 is statute-barred; and

(iv) the plaintiff is was not the right party to bring the action, the proper plaintiff should have been the financiers as the factory lines are owned by the financiers.

[11] D1's solicitors discharged themselves before trial was completed. As alluded earlier, D1 and D2 did not testify. In my view, it becomes a question whether the plaintiff has made out a *prima facie* case against them. D1 and D2 are entitled to rely on the plaintiff's evidence. This is because, in discharging its evidential burden in a civil case, one party's evidence is the other's as well. See:

(i) *Tan Kah Khiam v. Liew Chin Chuan & Anor* [2006] 4 CLJ 715; [2007] 2 MLJ 445 at [3];

(ii) *Md Hilmi Md Noor & Anor v. Azman Ahmad & Ors* [2016] 7 CLJ 360; [2016] 6 MLJ 205 at [23-24];

(iii) *Tenaga Nasional Bhd v. Bukit Lenang Development Sdn Bhd* [2017] 1 LNS 721; [2017] MLJU 782 at [66]; and

(iv) *U-Re Auto Sdn Bhd v. York Pacific Holdings Ltd* [2004] 3 CLJ 172.

Issues

[12] D2 filed a post-trial submission, D1 did not. It can be gleaned from D2's post-trial submission that she has abandoned the limitation and *locus standi* points.

[13] Thus, the issues to be determined in my view boil down to two as follows:

(i) whether D1 and D2 have breached their duties as directors of the plaintiff in causing the payment of a sum of RM13,100,000 to Equatorion for the purported supply of auxiliary equipment; and

(ii) if issue i is answered in the affirmative, whether the plaintiff had suffered losses as a result of D1 and D2's breaches and if so, liable to compensate the plaintiff for such losses.

Burden Of Proof

[14] In *Dato' Pardip Kumar Kukreja & Anor v. Veil Paari Samy Vellu* [2015] 1 LNS 1482; [2016] 4 MLJ 649 CA, Vernon Ong JCA (later FCJ) succinctly explained:

> [24] It is settled law that the party who desires the court to give judgment as to any legal right or liability bears the burden of proof (s. 101(1) of the Evidence Act 1950). The burden of proof is on that party is twofold: (a) the burden of establishing a case; and (b) the burden of introducing evidence. The burden of proof lies on the party throughout the trial. The standard of proof required of the plaintiff is on the balance of probabilities. The evidential burden of proof is only shifted to the other party once that party has discharged its burden of proof. If that party fails to discharge the original burden of proof, then the other party need not adduce any evidence. In this respect it is the plaintiff who must establish his case.
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> If he fails to do so, it will not do for the plaintiffs to say that the defendants have not established their defence (*Selvaduray v. Chinniah* [1939] 1 MLJ 253 (CA); s 102 of the Evidence Act 1950). On the effect of the burden of proof not being discharged, Terrell Ag CJ in *Selvaduray v. Chinniah*, adopting the position stated by the Court of Appeal in *Abrath v. North Eastern Railway Co* [1883] 11 QBD 440 said:
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> > In such a case as the present the position has been clearly stated in the judgment of Brett MR in *Abrath v. North Eastern Railway Co* [1883] 11 QBD 440 at p 452:
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> > > But then it is contended (I think fallaciously), that if the plaintiff has given *prima facie* evidence, which, unless it be answered, will entitle him to have the question decided in his favour, the burden of proof is shifted on to the defendant as

> the decision of the question itself. This contention seems to be the real ground of the decision in the Queen's Bench Division. I cannot assent to this.
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> It seems to me that the propositions ought to be stated thus: the plaintiff may give *prima facie* evidence which, unless it be answered either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favour: the defendant may give evidence either by contradicting the plaintiff's evidence or by proving other facts:
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> > the jury have to consider upon the evidence given upon both sides, whether they are satisfied in favour of the plaintiff with respect to the question which he calls them to answer; if they are, they must find for the plaintiff;
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> > but if upon consideration of the facts they come clearly to the opinion that the question ought to be answered against the plaintiff; they must find for the defendant.
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> > Then comes this difficulty – suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff: in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able by the additional facts which he has adduced to bring the minds of the whole jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him.

[15] The Federal Court in *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418; [2017] 4 MLJ 697 FC speaking through Jeffrey Tan FCJ at [48] to [63] offers valuable guidance on this subject. Particularly at [56] and [57], His Lordship elucidated:

> [56] Thus, **a plaintiff has both the burden of proof as well as the initial onus of proof**. In *Britestone Pte Ltd v. Smith & Associates Far East, Ltd* [2007] 4 SLR 855, the Singapore Court of Appeal per VK Rajah JCA, delivering the judgment of the court, explained that at the start of the plaintiff's case the burden of proof and the onus of proof coincide:
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> > ... at the start of the plaintiff's case, the legal burden of proving the existence of any relevant fact that the plaintiff must prove and the evidential burden of some (not inherently incredible) evidence of the existence of such fact coincide. Upon adduction of that evidence, the evidential burden shifts to the defendant, as the case may be, to adduce some evidence in rebuttal. If no evidence in rebuttal is adduced, the court may conclude from the evidence of the defendant. If, on the other hand, evidence in rebuttal is adduced, the evidential burden shifts back to the plaintiff. If, ultimately, the evidential burden comes to rest on the defendant,

> the legal burden of proof of the relevant fact would have been discharged by the plaintiff. The legal burden of proof – a permanent and enduring burden – does not shift. A party who has the legal burden of proof on any issue must discharge it throughout. Sometimes, the legal burden is spoken of, inaccurately, as 'shifting'; but what is truly meant is that another issue has been engaged, on which the opposite party hears the legal burden of proof.
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> [57] The rule is that **'the onus of proof of any particular fact lies on the party who alleges it, not on him who denies it**; *et incumbit probation qui decit, non qui negat, Actori incibit* probation ... **The plaintiff is bound in the first instance, to show a *prima facie* case, and if he leaves it imperfect, the court will not assist him**. Hence the maxim *Potior est* condition defendantis. A plaintiff cannot obviously advantage himself by the weakness of the defence. A plaintiff's case must stand or fall upon the evidence adduced by him. When, however, the defendant, or either litigant party, instead of denying what is alleged against him, relies on some new matter which, if true, is an answer to it, the burden of proof changes sides; and he, in his turn, is bound to show a *prima facie* case at least and, if he leaves it imperfect, the court will not assist him. *Reus excipendo fit actor*' (*Woodroffe and Amir Ali*, Vol 3 at pp 3190-3191).
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> (emphasis added)

[16] See also [17] of *Yeohata Machineries Sdn Bhd & Anor v. Coil Master Sdn Bhd & Ors* [2016] 2 CLJ 414; [2015] 6 MLJ 810, also a judgment of Vernon Ong JCA (later FCJ):

> ... **there must be some preponderance in the plaintiffs' favour at the conclusion of the whole case**. Even if the plaintiffs had established a *prima facie* case, but if at the conclusion of the trial the court finds that the position was exactly even, then any preponderance in favour of the plaintiffs has ceased to exist. If that happens, then the plaintiffs have failed to discharge the burden of proof which is upon it, and the plaintiffs must necessarily fail (*Abrath v. The North Eastern Railway Co* (1883) 11 QBD 440, at p 452).
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> (emphasis added)

[17] I would thus remind myself that if the plaintiff does not discharge its burden of showing a *prima facie* case, the claim would be dismissed notwithstanding whether the defence is or is not established. I now deal with the issues.

Director's Duties And Fiduciaries

[18] The Federal Court in *The Board Of Trustees Of The Sabah Foundation & Ors v. Datuk Syed Kechik Syed Mohamed & Anor* [2008] 3 CLJ 221; [2008] 5 MLJ 469 at [30] has adopted Millet LJ's definition of a fiduciary in *Bristol and West Building Society v. Mothew (t/a Stapley & Co)* [1998] Ch 1 at p 11 as follows:

A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. *The distinguishing obligation of a fiduciary is the obligation of loyalty*. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. *A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list*, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.

The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his mere *core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity* competence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.

(emphasis added)

[19] The law is clear that a director of a company is in fiduciary relationship with his company and as such he is precluded from acting in a manner which will bring his personal interest into conflict with that of his company – per Salleh Abas LP in *Avel Consultants Sdn Bhd & Anor v. Mohd Zain Yusof & Ors* [1985] 2 CLJ 11; [1985] CLJ (Rep) 37; [1985] 2 MLJ 209.

[20] In *Ford's Principles of Corporations Law* in Chapter 8 at para [8.050] at p. 312, a director is subject to the fiduciary's duty of loyalty and the duty to avoid conflicts of interest. Walter Woon on *Company Law* states that:

Firstly, a director must act in what he honestly considers to be the company's interests and not in the interests of some other person or body. This is a director's main and overriding duty at common law; Secondly, a director must employ the powers and assets that he is entrusted with for proper purposes and not for any collateral purpose; Thirdly, a director must not place himself in a position whereby his duty to the company and his personal interests may conflict.

[21] Section 213(1) Companies Act 2016 ("CA 2016') requires directors to exercise their powers in good faith and in the best interests of the company whilst s. 213(2) provides that directors must exercise reasonable care, skill and diligence:

Section 213(1) CA 2016:

(1) A director of a company shall at all times exercise his powers in accordance with this Act, for a proper purpose and in good faith in the best interest of the company.

(2) A director of a company shall exercise reasonable care, skill and diligence with:

(a) The knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and

(b) Any additional knowledge, skill and experience which the director in fact has.

[22] In *Pioneer Haven Sdn Bhd v. Ho Hup Construction Company Bhd & Anor And Other Appeals* [2012] 5 CLJ 169; [2012] 3 MLJ 616 at p. 654, the Court of Appeal held that ss. 132(1) and 132(1A) (re-enacted as s. 213(1) and (2) CA 2016), do not alter the law in this area but enhance the common law duty of care and equitable fiduciary duties. The Court of Appeal said at para 233:

> ... The prior provision of s. 132(1) requires a director to act honestly. The current s. 132(1) of the Act, requires a director to act in good faith in the best interests of the company. It is accepted that for all intents and purposes, the scope of the directors' duties to act honestly under the old s. 132(1) and the new s. 132(1) are the same. Thus the old case law relating to the duty to act honestly continues to be relevant (see *Cheam Tat Pang v. Public Prosecutor* [1996] 1 SLR 541). It is also recognised that the duty to act in the best interests of the company means different things, depending on the factual circumstances.

[23] The statutory no-conflict rule encapsulated in s. 221(1) of the CA 2016 (s. 131 of the CA 1965) mandates disclosure where a director is in any way whether directly or indirectly interested in a transaction with the company. It reads:

> Section 221 CA 2016:
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> (1) Subject to this section, every director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company shall, as soon as practicable after the relevant facts have come to the director's knowledge, declare the nature of his interest at a meeting of the board of directors.

[24] Section 221(9) of the CA 2016 makes plain that interest in the shares of a company include that of a spouse.

[25] The learned author Dato' Loh Siew Cheang in '*Corporate Powers Accountability*' explained the no-conflict and underlying fiduciary principle as follows:

> 14-4 *The no-conflict principle embodies two fundamental themes. First, directors cannot engage in 'self-dealings' or enter into transactions with a company in which they are directly or indirectly interested. Second, directors cannot make improper use of their office, company's property or information to make profits for themselves directly or indirectly*. This is commonly known as *the no-profit rule*. There are many ways in which directors may misuse their office to benefit themselves-from usurpation of corporate opportunities, receiving bribes or commission and misapplying company's property. The rule prohibiting undisclosed self-dealings and secret profits is a positive rule.

14-5 The underlying fiduciary principle against the abuse of office is well established. In *Gurbachan Singh s/o Bagawan Singh & Ors v. Vellasamy s/o Pennusamy & Ors* (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals, the Federal Court said:

> [69] *It is trite law that a person in a fiduciary position is not entitled to make a profit and he is not allowed to put himself in a position where his interest and duty are in conflict*. In *Boardman v. Phipps* [1966] 3 WLR 1009 Lord Hodson explained the rule as follows:
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> > Whether this aspect is properly to be regarded as part of the trust assets is, in my judgment, immaterial. The appellants obtained knowledge by reason of their fiduciary position and they cannot escape liability by saying that they were acting for themselves and not as agents of the trustees. Whether or not the trust or the beneficiaries in their stead could have taken advantage of the information is immaterial, as the authorities clearly show. No doubt it was but a remote possibility that Mr Boardman would ever be asked by the trustees to advice on the desirability of an application to the Court in order that the trustees might avail themselves of the information obtained. Nevertheless, even if the possibility of conflict is present between personal interest and the fiduciary position the rule of equity must be applied. This appears from the observations of Lord Cranworth LC in *Aberdeen Railway Co v. Blaikie* 1 Macq 461, 471.
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> In the later case of *Bray v. Ford* [1896] AC 44 Lord Herschell ... said:
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> > It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing. Indeed, it is obvious that it might sometimes be to the advantage of the beneficiaries that their trustee should act for them professionally rather than a stranger, even though the trustee were paid for his services.

14-6 In *Furs Ltd v. Tomkies*, the High Court of Australia explained the rationale as follows:

> *No director shall obtain for himself a profit by means of a transaction in which he is concerned on behalf of the company unless all the material facts are disclosed to the shareholders and by resolution in a general meeting approves of his doing so, or all the shareholders acquiesce. An undisclosed profit which a director so derives from the execution of his fiduciary duties belongs in equity to the company*. It is no answer to the application of the rule that the profit is of a kind which the company could not itself have obtained, or that no loss is caused to the company by the gain of the director. It is a principle resting upon the impossibility of allowing the conflict of duty and interest which is involved in the pursuit of private advantage in the course of dealing in a fiduciary capacity with the affairs of the company. If, when it is his duty to safeguard and further the interests of the company, he uses the occasion as a means of profit to himself, he raises an opposition between the duty he has undertaken and his own self interest, beyond which it is neither wise nor practicable for the law to look for a criterion of liability. The consequences of such a conflict are not discoverable. Both justice and policy are against their investigation.
>
> (emphasis added)

[26] The common law no-profit rule is also statutorily embodied in s. 218(1) CA of the 2016 which stipulates:

> Section 218 Prohibition against improper use of property, position, etc.
>
> (1) A director or officer of a company shall not, without the consent or ratification of a general meeting:
>
> (a) use the property of the company;
>
> (b) use any information acquired by virtue of his position as a director or officer of the company;
>
> (c) use his position as such director or officer;
>
> (d) use any opportunity of the company which he became aware of, in the performance of his functions as the director or officer of the company; or
>
> (e) engage in business which is in competition with the company,
>
> to gain directly or indirectly, a benefit for himself or any other person, or cause detriment to the company.

[27] Nallini Pathmanathan JCA (now FCJ) in *TAZ Logistics Sdn Bhd v. TAZ Metals Sdn Bhd & Ors* [2019] 2 CLJ 48; [2019] 3 MLJ 510 explained the 'no-profit rule' as follows:

> [112] The landmark case and starting point for the no profit rule must be *Regal (Hastings) Ltd v. Gulliver and Others* [1942] 1 All ER 378 more particularly the speech of Lord Russell where he explained the rule:

> … The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. *The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account*.
>
> (emphasis added)

[28] As D2, in her submissions, had referred to the business judgment rule in s. 214 of the CA 2016, it is best that this court reproduce it for ease of reference:

> 214. Business Judgment Rule
>
> (1) A Director who make a business judgment is deemed to meet the requirement of the duty under Section 213(2) and the equivalent duties of the common law and in equity if the director-
>
> (a) Makes the business decision for a proper purpose and in good faith;
>
> (b) Does not have a material personal interest in the subject matter of the business decision;
>
> (c) Is informed about the subject matter of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances;
>
> (d) Reasonably believes the business judgment is in the best interest of the company.
>
> (2) For the purposes of this section, "business judgment" means any decision whether or not to take action in respect of a matter relevant to the business of the company.

[29] In *Petra Perdana Bhd v. Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors* [2014] 1 LNS 236; [2014] 11 MLJ 1, Nallini Pathmanathan J (now FCJ) succinctly explained the duties of directors to exercise their powers in good faith and in the best interests of the company and the business judgment rule pursuant to ss. 132(1), (1A) and (1B) of the Companies Act 1965, (re-enacted as ss. 213(1), (2) and 214 of the CA 2016 respectively) which I produce *in extenso* as follows:

> [212] In *Pioneer Haven Sdn Bhd v. Ho Hup Construction Co Bhd & Anor and Other Appeals* [2012] 4 MLRA 210; [2012] 3 MLJ 616 at 654; [2012] 5 CLJ 169 the Court of Appeal held that ss. 132(1) and 132(1A) do not alter the law in this area but enhance the common law duty of care and equitable fiduciary duties. At para. 233, p. 654 this is what the Court said:

> … The prior provision of s. 132(1) requires a director to act honestly. The current s. 132(1) of the Act, requires a director to act in good faith in the best interests of the company. It is accepted that for all intents and purposes, the scope of the directors' duties to act honestly under the old s. 132(1) and the new s. 132(1) are the same. Thus, the old case law relating to the duty to act honestly continues to be relevant (see *Cheam Tat Pang v. Public Prosecutor* [1996] 1 SLR 541). It is also recognised that the duty to act in the best interests of the company means different things, depending on the factual circumstances.

[213] And the test to be adopted in determining whether there was a breach of such statutory duty was defined as follows at para. 238 at p. 655:

> [238] … The test is nicely condensed in Ford's Principles of Corporations Law (para 8.060), that there will be a breach of duty if the act or decision is shown to be *one which no reasonable board could consider to be within the interest of the company*.
>
> [239] This test is adopted in *Charterbridge Corpn Ltd v. Lloyds Bank Ltd* [1970] Ch 62 at p 74, in that, to challenge a decision of the directors the test is whether:
>
> > *… an intelligent and honest man in the position of the director of the company concerned, could in the whole of the existing circumstances have reasonably believed that the transactions were for the benefit of the company*.
>
> [240] The above principle is often referred to as the 'Charterbridge Principle'.
>
> …
>
> [242] It is important to note, following high authority, such as *Howard Smith Ltd v. Ampol Petroleum Ltd* [1974] AC 821, *that the court does not substitute its own decision with that of the directors*, since the decision of the directors to enter into the JDA is a management decision.

[214] This encapsulates the core of the duties owed by director under statute.

[215] Of relevance in the instant case is the statutory business judgment rule in s 132(1B) which states as follows:

> A director who makes a business judgment is deemed to meet the requirements of the duty under subsection (1A) and the equivalent duties under the common law and in equity if the director:
>
> (a) Makes the business judgment in good faith for a proper purpose;
>
> (b) Does not have a material personal interest in the subject matter of the business judgment;

(c) Is informed about the subject matter of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances; and

(d) Reasonably believes that the business judgment is in the best interests of the company.

[216] *The statutory business judgment rule encapsulates the common law business judgment rule as set out in Howard Smith Ltd v. Ampol Ltd [1974] AC 821*. In that case there was a challenge to the validity of an issue of shares by the directors of a company. The Court had to decide whether the said directors had been motivated by any purpose or personal gain or advantage or whether they had acted *bona fide* in the interests of the company. The judge found that the primary purpose of the allotment was to proportionately reduce the shareholdings of certain majority shareholders such that a take-over could be facilitated by another entity. It was found in those circumstances that the directors had improperly exercised their powers. The matter proceeded to the Privy Council where the Judicial Committee found, dismissing the appeal that, although the directors had acted honestly and had power to make the allotment, to alter a majority shareholding was to interfere with an element of the company's constitution which was separate from the directors' powers and accordingly it was unconstitutional for the directors to use their fiduciary powers over the shares in the company for the purpose of destroying an existing majority or creating a new majority. And since the directors' primary object for the allotment of shares was to alter the majority shareholding, the directors had improperly exercised their powers and the allotment was invalid.

[217] In so holding the Judicial Committee commented *inter alia*, in relation to the business judgment rule as follows:

> ... In order to assist him in deciding upon the alternative motivations contended for, the judge considered first at some length, the objective question whether Millers was in fact in need of capital. This approach was criticised before their Lordships: it was argued that what mattered was not the actual financial condition of Millers, but what the majority directors *bona fide* considered that condition to be. *Their Lordships* accept that such a matter as the raising of finance is one of management, within the responsibility of the directors: they *accept that it would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management's decision on such a question, if bona fide arrived at. There is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at*.
>
> But accepting all of this, when a dispute arises whether directors of a company made a particular decision for one purpose or another, or whether there being more than one purpose, one or other purpose was the substantial or primary purpose, the court, in

their Lordships' opinion, is entitled to look at the situation objectively in order to estimate how critical or pressing or substantial or, per contra, insubstantial an alleged requirement might have been. If it finds that a particular requirement, though real, was not urgent, or critical, at the relevant time, it may have reason to doubt, or discount the assertions of individuals that they acted solely in order to deal with it, particularly when the action they took was unusual or even extreme.

[218] ...

Fiduciary duties

[219] A company director is recognised as having a fiduciary relationship with his company. As stated in Ford's Principles of Corporations Law in Chapter 8 at para [8.050] at p 312, a director is therefore subject to the fiduciary's *duty of loyalty and the duty to avoid conflicts of interest. Case-law establishes under the scope of a director's fiduciary duty that he must exercise his powers bona fide and in the best interests of the company as a whole. This is similar to, and captured by the duties imposed by statute (see s. 132(1) above). The essence of the fiduciary duty is a duty to act bona fide in the interests of the company and not for a collateral purpose* (see *In Re Smith and Fawcett, Limited* [1942] 1 Ch 304 at pp 306 and 308 and *Multi-Pak Singapore Pte Ltd (In Receivership v. Intraco Ltd & Ors* [1994] 2 SLR 282 at p. 287). *Although the directors are vested with powers which carry implicitly some degree of discretion, such powers must be exercised bona fide, meaning for the purpose for which they were conferred and not arbitrarily or at the will of the directors, but in the interests of the company*. (See *Greenhalgh v. Ardene Cinemas Ltd* [1951] Ch 287 at 291; *Blackwell v. Moray and Anor* (1991) 3 ACSR 255).

Did Tengku Ibrahim, Lawrence Wong and Tiong who were directors of the plaintiff at the material time exercise their powers for a proper purpose or for an improper purpose when they decided to undertake the Second and Third Divestments?

[220] *If the impugned directors exercised their powers for a proper purpose, it then follows that they acted bona fide in the interest of the company. If, however they exercised their powers for an improper purpose as is alleged by the plaintiff, then they have failed to act in the best interests of the company and would be in breach of their statutory, fiduciary and common law duties as directors*.

[221] In order to answer this question in relation to the two divestments *this Court needs to ascertain the substantial object or purpose* for which the board decided to divest of the PEB shares. (see *Howard Smith Ltd v. Ampol Ltd* (above).

[222] In ascertaining the substantial object or purpose for which each of these three directors decided to divest of the PEB shares, *it is necessary to ascertain their individual states of mind at the time when the decision to undertake the Divestments was made*. In ascertaining the state of mind of the directors, regard may be had to the circumstances surrounding the decision. In *Hindle v. John Cotton Ltd* (1919) 56 Sc LR 625 at 630-1, Viscount Findlay stated as follows:

A *Where the question is one of absence of powers, the state of mind of those who acted and motive on which they acted are all important, and you may go into the question of what their intention was, collecting from the surrounding circumstances all the materials which genuinely throw light upon that question of the state of mind of the directors so as to show whether they were honestly acting in the discharge of their powers in the interests of*
B *the company or were acting from some bye-motive, possibly of personal advantage or for any other reason*.

(emphasis added)

[30] Her Ladyship Nallini Pathmanathan J (now FCJ) further explained:

C [364] Business judgment has been defined to mean 'any decision on whether or not to take action in respect of a matter relevant to the business of the company' (see s. 132 of the Companies Act). In *Australian Securities and Investments Commission v. Rich* (2009) 75 ACSR 1 Austin J accepted a wide interpretation of the scope of 'business judgment'. The words 'in respect of, 'matter' and 'relevant' were accorded considerable
D breadth. As such it follows that an issue such as a shortage of cash flow and the disposal of assets falls squarely within this definition.

[365] The effect of the statutory business judgment rule in the current context is this: *If the impugned directors can show that they made the decisions to affect the second and third divestments, as a business judgment within the scope*
E *of s. 132(1B) of the Companies Act 1965, then they are deemed to have met their obligations and duties as directors under statute, common law and equity. In other words, the requirements of s. 132(1A) of due care and diligence in the exercise of their duties would have been met*.

[366] How then is this to be ascertained? *The courts do not undertake the exercise of assessing the merits of a commercial or business judgment*
F (see *Smith (Howard) Ltd v. Ampol Petroleum Ltd* [1974] AC 821).

[367] In the Australian case of *Australian Securities and Investments Commission v. Rich* [2009] ACSR 1 ('the Rich case') the enquiry related to the managing director Rich and the finance director, Silberman's failure to advise the board of directors that the company was insolvent. It should
G be highlighted that the statutory Australian provision equivalent to s. 132(1B) is similar to our provision save for the use of the words 'rationally believes' rather than 'reasonably believes' in our section. While it has been argued by the American Law Institute that 'rationally believe' is considerably wider than 'reasonably believe' I am unable to subscribe entirely to that construction. Rational by definition alludes to a decision
H based on reason or logic. Reasonable as a word has much the same effect, namely a decision premised on logic or sense. The distinction does not therefore appear to be as wide as is suggested.

[368] *In the Rich case, Austin J. set out a compendium of requirements that need to be satisfied in or order to satisfy this requirement of 'rational' belief. As 'rational'*
I *is not entirely dissimilar to 'reasonable' it appears that the criteria set out in Rich's case are applicable under s. 132(1B).* Austin J. held there that reasonableness should be assessed by reference to:

(a) the importance of the business judgment that is to be made;

(b) the time available for obtaining information;

(c) the costs related to obtaining information;

(d) the director's confidence in exploring the matter;

(e) the state of the company's business at that time and the nature of the competing demands on the board's attention; and

(f) whether or not the information is available to the director.

[369] The Supreme Court of Canada in *Peoples Department Stores Inc (Trustee of) v. Wise* [2004] 3 SCJ No 64 held as follows at para 64:

> *Business decisions must sometimes be made with high stakes and under considerable time pressure in circumstances in which detailed information is not available. It might be tempting for some to see unsuccessful business decisions as unreasonable or imprudent in light of information that becomes available ex post facto. Because of this risk of hindsight bias, Canadian courts have developed a rule of defence to business decisions called the "business judgment rule".*

[370] Reference was made to *Maple Leaf Foods Inc v. Schenieder Corp* (1998) 42 OR (3d) 177:

> The law as it has evolved in Ontario and Delaware has the *common requirements that the court must be satisfied that the directors have acted reasonably and fairly. The court looks to see that the directors made a reasonable decision not a perfect decision*. Provided that the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. *As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision*. This formulation of *deference to the decision of the Board is known as the "Business judgment rule*". The fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction.
>
> (emphasis added)

[31] The Federal Court in *Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal* [2018] 2 CLJ 641; [2018] 2 MLJ 177 affirmed the High Court decision of Nallini Pathmanathan J (now FCJ), and in its judgment delivered by Azahar Mohamed FCJ (later CJM) elucidated and held that the true test for breach of duty as a director to act in good faith and in the 'best interest of the company' is a combination of both the subjective and objective tests:

> [165] What then is the true test for breach of duty as a director to act in good faith and in the 'best interest of the company'? The question is whether it is a subjective or objective test to judge whether directors acted in the best interest of the company. It is to this we now turn.

[166] In our judgment, the correct test combines both subjective and objective tests. The test is subjective in the sense that the breach of the duty is determined on an assessment of the state of mind of the director; the issue is whether the director (not the court) considers that the exercise of discretion is in the best interest of the company. In this regard, in *Corporate Law* by Hans Tjio, Pearlie Koh and Lee Pey Woan at p 361, the learned authors said that the director's conduct is tested by reference to an essentially subjective barometer. The classic formulation of the subjective element in the test is found, as we have discussed earlier at para 157, in Re Smith & Fawcett, Limited in which Lord Greene MR said that 'directors must exercise their discretion *bona fide* in what they consider – not what a court may consider – is in the interest of the company'. The duty is to act in what the director believes, not what the court believes, to be the best interest of the company. The subjective nature of the test can be seen in *Regentcrest Plc (in liq) v. Cohen* [2001] BCC 494 where Jonathan Parker J said:

> ... the question whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test.

[167] The test is objective in the sense that the director's assessment of the company's best interest is subject to an objective review or examination by the courts. In an article entitled *Directors' Duty to Act in the Interests of the Company: Subjective or Objective?* [2015] JBL Issue 2, the writers said that courts have introduced objective elements into the duty to act in good faith and in the best interest of the company to address the problem identified by Browen LJ in *Hutton v. West Cork Railway Company* (1883) 23 Ch D 654 at p 671 where the learned judge said:

> *Bona fides* cannot be the sole test, otherwise you might have a lunatic conducting the affairs of the company, and paying away its money with both hands in a manner perfectly *bona fide* yet perfectly irrational. The test must be what is reasonably incidental to, and within the reasonable scope of carrying on, the business of the company.

[168] The Singapore Court of Appeal in *Goh Chan Peng And Others v. Beyonics Technology Ltd and another and another appeal* [2017] 2 SLR 592; [2017] SGCA 40 explained the preferred approach which combines both subjective and objective tests as follows:

> Indeed, there are both subjective and objective element in the test. The subjective element lies in the court's consideration as to whether a director had exercised his discretion *bona fide* in what he considered (and not what the court considers) is in the interests of the company: *Re Smith & Fawcett Ltd* [1942] Ch 304 at 306, as

accepted by this court in *Cheong Kim Hock v. Lin Securities (Pte) (in liquidation)* [1992] 1 SLR (R) 497 at 26 and in *Ho Kang Peng v. Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 (*'Ho Kang Peng'*) at 37. Thus, a court will be slow to interfere with commercial decisions made honestly but which, on hindsight, were financially detrimental to the company.

The objective element in the test relates to the court's supervision over directors who claim to have been genuinely acting to promote the company's interest even though, objectively, the transactions were not in the company's interests. The subjective belief of the directors cannot determine the issue: the court has to assess whether an intelligent and honest man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company. This is the test set out in *Charterbridge Corporation Ltd v. Lloyds Bank Ltd* [1970] 1 Ch 62

(at 74) and it has been applied here since adopted by this court in *Intraco Ltd v. Multi-Pak Singapore Pte Ltd* [1994] 3 SLR (R) 1064 (at [28]).

[32] The Federal Court at [177] and [178] reaffirmed the *Charterbridge Principle* exposited by Zainun Ali JCA (later FCJ) in *Pioneer Haven Sdn Bhd v. Ho Hup Construction Co Bhd & Anor And Other Appeals* in that, to challenge a decision of the directors, the test is whether: an intelligent and honest man in the position of the director of the company concerned, could in the whole of the existing circumstances have reasonably believed that the transactions were for the benefit of the company.

Evaluations And Findings

Whether D1 And D2 Have Breached Their Duties As Directors Of The Plaintiff

[33] Guided by the instructive principles set out in the preceding paragraphs, I now deal with this issue.

[34] As starters, having heard the evidence of the ten witnesses called for the plaintiff, examined and read the relevant documents and submission of the parties, I am of the respectful view that the plaintiff has proven a *prima facie* case on a balance of probability that D1 and D2 had acted in breach of their duties to the plaintiff and the plaintiff has suffered losses as a consequence of their breaches of duties.

[35] In this regard, the plaintiff has adduced clear evidence to show:

(i) a total of RM32,784,000 was paid by the plaintiff and its financiers to KSG for the supply of the factory lines including auxiliary equipment. Out of this sum, RM13,100,000 was paid by KSG to Equatorion purportedly for supply of auxiliary equipment based on fabricated documents (invoices and official receipts from Equatorion);

(ii) Mr Tsen, PW1 from KSH testified that in March and April 2014, KSG completed the supply, installation and commissioning of the main lines; when commissioning the factory lines, he observed that the auxiliary equipment had already been supplied and installed by another supplier; neither he nor KSG had prior dealings with Equatorion in respect of the auxiliary equipment; in May 2014, KSG received invoices from Equatorion for amount of RM16,000,000 and he was asked two months later by D1 to pay them; he received two receipts from Equatorion totalling RM2,900,000 dated 24 March 2014 and 14 May 2014 only in August 2014;

(iii) Madam Kok, PW9, assistant manager between 2007 to 2020 from the plaintiff's procurement department gave evidence of considerable weight that she knew Equatorion's business is that of a canteen food supplier; there were no quotations and purchase orders between Equatorion and the plaintiff, it was standard operating procedure for the procurement department to be involved in the procurement of assets, there was no such appointment of Equatorion by plaintiff nor purchase orders or quotations issued between the plaintiff and Equatorion to supply the auxiliary equipment; she testified that the auxiliary equipment was not supplied by Equatorion, but was in fact supplied by the following third-party suppliers:

(a) Ripcol Industries Sdn Bhd ("Ripcol") supplied items relating to the chlorination system of the factory lines;

(b) Xin Xin Engineering Sdn Bhd supplied items relating to the glove stripping/autostripping machines of the factory lines;

(c) perfect combustion supplied items relating to the gas burners of the factory lines; and

(d) Zibo Haoxiang Ceramics Trading or PT Mark Dynamics supplied items relating to the glove formers of the factory lines.

In her Q&A 20, 22 and 22, PW9 testified:

(a) "...Equatorion was Dato' Lee's company.";

(b) "...it was common knowledge that "Equatorion is Dato Lee's company.";

(c) "anything related to Equatorion would require Dato' Lee's approval";

(d) she was acting on the instructions of D1 in respect of Equatorion.

(iv) Chia Jenn Chuan (PW8) business development director from Ripcol testified that Ripcol is the **sole** supplier of the chlorination systems of the plaintiff's factory lines; Ripcol for its supply has received payment

from the plaintiff. Both PW8 and PW1 from KSG testified that they have never heard of Equatorion being in the business of supply, install and/or commission of auxiliary equipment; in this regard, the court notes that D2's submission that no one from Ripcol was called to give evidence and that an adverse inference should be drawn against the plaintiff is misconceived;

(v) KSG paid Equatorion RM13,100,000 as evidenced by its bank statements; the receipt of the RM13,100,000 by Equatorion from KSG is also corroborated by the bank statements of Equatorion as confirmed by Puan Rozaimah bin Abdul Razak (PW2), branch manager of RHB Banking Berhad (where Equatorion's bank account was opened);

(vi) D1 and D2 ultimately controlled Equatorion:

(a) D2 held 66.67% of Equatorion's shareholding (100,000 out of 150,000 ordinary shares);

(b) Lee Soon Khim, D1's cousin (see testimony of PW10, Martin Tupila, forensic accountant from Ernst and Young Advisory Pte Ltd, Singapore) and a known nominee and/or agent of D1 and D2 is a director of Equatorion;

(c) Cheong Ah Yoke, a Senior Project Executive and an employee of the plaintiff from 2005 to 2019 whose appointment was signed off by D1 in the plaintiff and other companies related to D1 and D2 namely AHP and AMP, is a director and shareholder in Equatorion with 33.33% shareholding (49,998 of 150,000 ordinary shares);

(d) D1 is a signatory for:

(1) two out of three Equatorion's bank accounts in RHB Bank Nilai as confirmed by PW2, the Branch Manager of RHB Bank Berhad, Nilai branch; and

(2) Various commercial documents for Equatorion as confirmed by Fadzillah binti Awaludin (PW4), plaintiff's Accounts Assistant Manager.

(vii) D1 paid himself RM3,663,000 through Equatorion:

(a) On 9 September 2014, RM300,000 was paid *via* RENTAS;

(b) On 26 August 2015, RM1,600,000 was paid *via* Equatorion; D1 was one of the signatories of the cheque;

(c) On 26 August 2015, another RM1,763,000 was paid *via* Equatorion to the plaintiff where D1 is one of the signatories which was classified in plaintiff's books "For Production Line Cost" and then on 30 November 2015, the entry was re-classified as "Amount Owing To Director-LSH";

(viii) D1 and/or D2 were former directors and/or shareholders of AHP, AMP, Asia Cosmopolitan and GTH – these companies received in total a sum of RM5,371,000 from the secret profit made by D1 and D2 *vide* Equatorion;

(ix) Equatorion's invoices and report and financial year statement as at 31 December 2010 bear the same address as the plaintiff;

(x) D1's employees *eg*, PW9 were used to facilitate Equatorion's activities within the plaintiff's premises; and

(xi) other than the questionable invoices and receipts, there is no evidence to show that Equatorion had actually supplied the auxiliary equipment.

[36] In the face of such demonstrably overwhelming evidence, D1 and D2 in my view have a case to answer in respect of the fictitious supply of auxiliary equipment by Equatorion through fabricated invoices and receipts; secretly profiting of the sum of RM13,100,0000 and gaining a personal benefit therefrom that point towards their breaches of duties as directors. I find the fate of the claim against them for breach of duties as directors was sealed when both D1 and D2 did not testify since they claimed in their defence that the transactions entered into with KSG was proper. Their subjective belief is simply not good enough, it was critical for them to testify on what they D1 and D2 as directors believe and to enable the court to assess their state of mind and the motive on which they acted on the basis of whether an intelligent and honest man in the position of D1 and D2 as directors of the plaintiff could, in the whole of the existing circumstances, have reasonably believed that the transactions with KSG were for the benefit of the plaintiff company. It would be critical to ascertain the true state of affairs by resort to cross-examination. D1 and D2 irrevocably undermined their position by not testifying. I can be forgiven for concluding that both were avoiding cross-examination. It behoves them to give evidence to rebut the plaintiff's case.

[37] In *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381; [2009] 6 MLJ 751, the Federal Court speaking through Gopal Sri Ram FCJ, provided a useful guide when there is no evidence put forth by a party in a civil case:

> [4] In our judgment, *two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence.*

In the first place, the evidence given by the appellant ought to have been presumed to be true. As Elphinstone CJ said in *Wasakah Singh v. Bachan Singh* (1931) 1 MC 125 at p 128:

> If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. At this stage, the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.
>
> Now, what the trial judge did in the present case is precisely what he ought not to have done. He expressed dissatisfaction with the appellant's evidence without asking himself that most vital question: does the first defendant/respondent have a case to answer? This failure on the part of the trial judge is a serious non-direction amounting to a misdirection which occasioned a miscarriage of justice. The trial judge was at that stage not concerned with his belief of the appellant's evidence. She had given her explanation as to the discrepancies in the figures. And her evidence does not appear to be either inherently incredible or inherently improbable. *In these circumstances it was the duty of the judge to have accepted her evidence as true in the absence of any evidence from the first respondent going the other way. He however failed to direct himself in this fashion thereby occasioning a serious miscarriage of justice*.

[5] *The second consequence is that the court ought to have drawn an adverse inference against the first respondent* on the amount of the appellant's contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement that she had with the first respondent. *Where, as here, the first respondent being a party to the action provides no reasons as to why she did not care to give evidence the court will normally draw an adverse inference*. See *Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33. See also *Jaafar bin Shaari & Anor (suing as Administrators of the Estate of Shofiah bte Ahmad, deceased) v. Tan Lip Eng & Anor* [1997] 3 MLJ 693 where Peh Swee Chin FCJ said: 'The respondents had chosen to close the case at the end of the appellants' case. Although they were entitled to do so, they would be in peril of not having the evidence of their most important witness and of having an adverse inference drawn against them for failing to call such evidence should the circumstances demand it.

The other case is *Crawford v. Financial Institutions Services Ltd (Jamaica)* [2005] UKPC 40, where Lord Walker of Gestingthorpe when delivering the advice of the Privy Council said:

> It is well settled that in civil proceedings the court may draw adverse inferences from a defendant's decision not to give or call evidence as to matters within the knowledge of himself or his employees.

Sarkar on Evidence (16th Ed) at p 1837 states:

> It is the bounden duty of a party personally knowing the whole circumstances to give evidence and to submit to cross-examination. Non-appearance as a witness would be the strongest possible circumstance to discredit the truth of his case *Gurbakhsh v. Gurdial* AIR 1927 PC 230.

[6] In *the present instance, there is no doubt that the first respondent had intimate knowledge of the material facts relevant to the dispute and that she was privy to the several steps through which the transaction had proceeded. Based on the authorities already cited, it is patently clear that the trial judge in the present case ought to have held that the failure of the first respondent to give evidence apart from discrediting her case strengthened the appellant's case on those vital points that lay at the axis of the dispute between the parties*. This, the trial judge clearly omitted to do. *Instead, he treated the first respondent's failure to appear and give evidence as a matter of no apparent consequence. His non-direction upon such a crucial point as this certainly amounts to a misdirection which has occasioned a miscarriage of justice*. To conclude the first issue, it is our judgment that there was no judicial appreciation of the appellant's evidence. A reasonable tribunal correctly directing itself on the facts and the relevant law would have held that the appellant had indeed contributed RM194,610 towards the purchase price of the building; that there was a mutual understanding between the appellant and the first respondent that they shall be beneficial co owners of the property in question in equal shares; and that the first respondent had acted in breach of that understanding.

[38] Both D1 and D2 are clearly material witnesses due to their forming the majority of the Board of Directors of the plaintiff and their obvious control of Equatorion and beneficial interest therein. This court is thus entitled to draw an adverse inference against D1 and D2 where, as here, both were conversant thoroughly with the material facts of the case, advanced no credible reason as to why they did not care to give evidence. Following *Takako Sakao*, such failure to testify also entitles this court to presume to be true the evidence given by the plaintiff's witnesses. At any rate, even after reminding myself of the limits that the court does not substitute its own decision with that of the directors, since the decision to enter into the KSG transactions is a management decision, even so, from the body of evidence adduced by the plaintiff, I find inflating the cost for each of the factory line by RM4,000,000 and have the monies then siphoned to Equatorion which both D1 and D2 are beneficially interested in, and at the expense of the plaintiff, is not conduct of loyalty and fidelity to the plaintiff when both of them were placed in a position of confidence and trust. An intelligent and honest man in the positions of either D1 and D2 simply could not, in the whole of the existing circumstances, have reasonably believed that what they did was acting primarily in good faith, *bona fide* and would be in the best interest of the plaintiff company. As fiduciaries, the foremost consequence is that both would owe a duty of undivided loyalty to the plaintiff and must be held accountable. They had from the evidence adduced, undoubtedly

personally profited from the KSG transactions when a substantial portion of the funds for the purchase of the factory lines originating from the plaintiff and their financiers ended up in D1's own bank account or in companies related to them. It is pure and simple a case of the proverbial "Harap pagar, pagar makan padi". A

[39] In *Words, Phrases and Maxims Legally and Judicially Defined* - Anandan Krishnan, "good faith" is defined amongst others, as: B

> The phrase 'good faith' lays emphasis on honesty and fair play to the expulsion of any pretence, deceit and wanton or willful negligence. (*Ram Saran v. Kuriamal*, 1988 AL] 1288).
>
> The words ..." good faith' conveys the absence of intent to deceive. (*Sir Padam Pat Singhania v. Commissioner of Gift Tax* 1988 UPTC 71). C
>
> 'In order to act in good faith, a person must act honestly. A "'person who acts in a particular manner in the discharge of his duties in spite of the knowledge and consciousness that injury to some one or group of persons is likely to result from his act or omission he cannot be said to act with honesty or good faith'. D

[40] It is trite that where there is a question as to the good faith of a transaction between parties, one of whom stands to be the other in position of active confidence, the burden of proving the good faith of the transaction is on the party who is in position of active confidence. See: *Khaw Cheng Bok & Anor v. Khaw Cheng Poon & Ors* [1998] 1 LNS 340; [1998] 3 MLJ 457; *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors. & Other Appeals* [1997] 2 CLJ 607; [1996] 2 MLJ 265; *Lim Kim Hua v. Ho Chui Lan & Anor* [1996] 2 CLJ 299; [1995] 3 MLJ 165; *Loi Hieng Chiong v. Kon Tek Shin* [1983] 2 CLJ 70; [1983] CLJ (Rep) 240; [1983] 1 MLJ 31; *Siti Haida Ismail v. Siti Maznah Yahya & Ors* [2018] 1 LNS 1081; [2018] 6 MLJ 701. **But** D1 and D2 failed to testify. I am thus constrained to find that bad faith is not dispelled. E F

[41] Evident from a consideration of the totality of the evidence adduced by the plaintiff, there is no escaping that D1 and D2 have indubitably failed to exercise their powers as directors for a proper purpose, failed to exercise reasonable care skill and diligence in the discharge of their duties; breached their duty to act in good faith and in the best interest of the plaintiff, breached their duty of permitting their interest to conflict with that of the plaintiff, breached their duty not to make a secret profit with impugnity and breached their duty to disclose to the plaintiff's Board their personal interest in Equatorion. The plaintiff's shareholders' consent at a general meeting was not sought to allow D1 and D2 to make the profit of RM13,100,000. Even if D2 did not actively participate in the KSG transactions, she is not absolved as by her silence, amounts to her tacit approval of all that was wreaked by D1, she was thus complicit in the plunder of the plaintiff. D2 as majority shareholder of Equatorion which is a canteen food supplier, in the circumstances of extraordinary bounty of multi millions of Ringgit going G H I

through its bank accounts, should have excited D2's grave suspicion and vigilance. She had allowed Equatorion to be used as a vehicle by D1 to loot the plaintiff in dereliction of her duties to safeguard the interests of the plaintiff as a whole. With utmost respect, her post trial submission does not assist her one whit as the plaintiff's evidence stands unrebutted.

[42] Issue 1 is answered in the affirmative.

Whether The Plaintiff Had Suffered Losses As A Result Of D1 And D2's Breaches And If So, Liable To Compensate The Plaintiff For Such Losses

[43] As alluded earlier, a total sum of RM32,784,000 was paid by the plaintiff and its financiers to KSG for the supply of the factory lines including auxiliary equipment. Out of this sum, it is patently clear that RM13,100,000 was paid by KSG to Equatorion. PW10 testified that from a company search, Equatorion has been dissolved on 23 May 2018. I find the plaintiff has suffered losses in respect of this sum of RM13,100,000 as well as finance charges on the said sum arising from the various hire purchase agreements with the financiers which PW10 calculated at RM2,532,608.04 as set out in his witness statement at encl. 225. I also find that the plaintiff's losses are causally connected directly to D1 and D2's breaches of directors' statutory and fiduciary duties to the plaintiff.

[44] It is trite that the remedy imposed on the wrongdoers for breach of fiduciary duties would be compensation in equity. The measure of compensation is to put the plaintiff in the position it would have been had the breach not been committed, see *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [2000] 2 CLJ 833; [2000] 2 MLJ 353 at p. 378.

[45] It follows there will be judgment for the plaintiff as follows:

(i) a declaration that D1 and D2, Lee Son Hong and Too Sooi Keng have breached their fiduciary obligations as directors of the plaintiff under the Companies Act 2016 and/or at common law;

(ii) a declaration that D1 and D2 are jointly and/or severally liable to pay and/or account to the plaintiff the sum of RM13,100,000;

(iii) the sum of RM RM2,532,608.04 as finance charges on the sum of RM13,100,000;

(iv) interest at 5% per annum on the said sums of RM13,100,000 and RM2,532,608.04 from date of judgment to full payment;

(v) costs of RM120,000 subject to allocator to be paid to the plaintiff; and

(vi) all sums including interest and costs awarded to the plaintiff are to be paid by D1 and D2 jointly and/or severally to the plaintiff.

[46] I have not overlooked that D2 in her submission has disputed that PW10 is not an expert. Even so, he is a plaintiff's witness with 20 years background in accountancy. In awarding the sum of RM2,532,608.04 as finance charges incurred on the sum of RM13,100,000, I have considered that D1 and D2 have not rebutted PW10's calculation which I find to be a genuine estimate. The burden is on D1 and D2 to show that the calculation was manifestly erroneous but both offered not a jot of evidence to assist the court.

[47] As this is not a bifurcated trial, there will be no separate assessment of damages on interest paid by the plaintiff to various financiers arising from RM13,100,000 as urged upon this court by the plaintiff. Added to that, the request at this eleventh hour, makes it wholly impracticable for me to arrange a hearing due to my wider responsibilities to other litigants before I retire from the judiciary next weekend.

[48] The costs awarded commensurate with the criteria in O. 59 r. 16 of the Rules of Court 2012 and includes the costs of the application for stay of proceedings both here and at the Court of Appeal where costs was ordered to be costs in the cause.